

ID: CCA_2010041612241041

Number: **201020014**

Office:

Release Date: 5/21/2010

UILC: 3509.00-00

From:

Sent: Friday, April 16, 2010 12:24:13 PM

To:

Cc:

Subject: RE: 3121(b)(20), 3121(d)(1), and 3509 interrelations

I see your point and it's a complicated question b/c the issues merge together somewhat. However, if the ER failed to pay FICA tax b/c of erroneous reliance on section 3121(b)(20), then Flamingo Fishing says it's not a worker classification issue and 3509 doesn't apply. For FICA to apply, there has to be an underlying employment relationship, either as common law EE, officer, etc. But that doesn't mean the employee status itself was at issue or the reason for the failure to pay FICA.

So it seems that we wouldn't apply 3509, so that 6521 could apply.

Note that it's also our view that section 530 is also not relevant to the examination if the question is whether compensation is excluded from wages or services are excluded from employment. (Of course in this case, it appears that taxpayer would fail the reporting consistency test anyway because no 1099s were filed.)

That's where I come out on this.